

JORDAN



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Technology, Inc.

File: B-236255

Date: November 16, 1989

DIGEST

1. Agency did not mislead or coerce protester into raising its labor rates where the agency was reasonably concerned that protester had proposed unreasonably low rates and, in discussions, offered protester the choice of proposing more realistic rates or explaining how it could absorb the cost differential between its proposed rates and the probable cost of performance.

2. Where offerors' financial capability, traditionally a matter of responsibility, is included as a technical evaluation criterion, but is not the subject of a comparative evaluation, contracting officer did not act unreasonably to resolve his doubts about small business offeror's financial capability to perform in determining that offeror was not responsible and referring the matter to the Small Business Administration under the certificate of competency procedures.

3. Awardee's addition of new credit sources to improve financial status during Small Business Administration certificate of competency process does not constitute improper discussions requiring agency to reopen discussions with all offerors in the competitive range.

DECISION

Eagle Technology, Inc., protests award of a contract to Scientific Systems Company (SSC) under request for proposals (RFP) No. N61339-88-R-0031, issued by the Naval Training Systems Center (NTSC), Orlando, Florida. Eagle contends that the agency misled it during discussions, failed to properly apply the evaluation criteria to SSC, and improperly conducted discussions with SSC after receipt of best and final offers (BAFOs).

We deny the protest.

C47122/140046

The RFP, a 100 percent small business set-aside, sought proposals for instructional systems development support which included early analysis of training requirements as well as the creation and update of training curricula for land-based and generic military systems. The RFP contemplated award of an indefinite delivery, indefinite quantity contract for 1 year with four 1-year options. Offerors were required to propose estimated labor hours for each of 15 labor categories, with a single fixed rate for each category, consisting of the fully burdened, composite rate for the prime contractor and its subcontractors. Delivery orders, whether firm fixed price or time and materials orders, would use only the labor and G&A rates proposed by the contractor. The RFP stated award would be made to the low cost technically acceptable offeror.

Of the six offerors submitting proposals, only three, including SSC and Eagle, were found susceptible to being made acceptable and placed in the competitive range. Eagle proposed the low initial price of \$9,399,200 while SSC proposed the highest initial price of \$16,979,404; the other prices ranged between. Written and oral discussions were conducted with Eagle and the other competitive offerors. Following discussions, all three offerors were found technically acceptable.

Best and final offers (BAFOs) were then requested. Enclosed with the BAFO requests was amendment 0004 advising offerors of new evaluation criteria, "Evaluation of Unreasonably Low Rates," which provided in pertinent part:

"The contractor proposed rates, both direct and indirect, will be considered as a critical risk assessment item in the technical proposal. An offer based upon unreasonably low rates may be technically downgraded or rated unacceptable. Any offeror proposing unrealistically low rates will be required to:

- a. demonstrate an understanding of the requirement for which the unrealistic rates are proposed;
- b. address their ability to provide the caliber of labor required for the effort;
- c. demonstrate their capability to absorb the cost differential between the

rates proposed and the probable real
cost"

The clause also warned offerors that the government fully expected to hold the contractor to its low rate schedule and would carefully assess its performance to ensure the proper level of support was provided.

All three offerors submitted BAFOs. SSC was the lowest offeror at \$12,128,728 and Eagle was the highest offeror at \$16,979,404. The contracting officer reviewed the BAFOs to determine whether any changes made would affect the acceptable ratings of the offerors and to determine whether they met the evaluation criteria of amendment 0004. Based upon his review, the contracting officer determined not to downgrade any of the proposals to unacceptable.

The contracting officer was concerned, however, about SSC's financial capability to perform the contract in light of its proposed low rates and, after a negative preaward survey, determined that SSC was not responsible. Thus, he referred the matter to the Small Business Administration (SBA) for a certificate of competency (COC) determination. During the SBA review, SSC added two new credit sources with significant working capital and assets. Based upon this improvement in SSC's financial backing, the SBA approved a COC. The Navy then awarded the contract to SSC and Eagle filed its protest with our Office.

As a preliminary matter, the Navy contends that Eagle, as third low offeror, is not an interested party since it would not be in line for award if its protest is sustained. See Bid Protest Regulations, 4 C.F.R. §§ 21.0(a), 21.1(a) (1989). However, since Eagle complains that discussions with itself and SSC were misleading and improper, the appropriate remedy, if we sustain this protest, would be the reopening of negotiations and reevaluating of proposals, thus allowing Eagle to compete. With regard to Eagle's protest that SSC's BAFO was not properly evaluated, we find this issue to be so closely related to Eagle's protest of improper discussions that we will consider it on the merits as well. This is so because all these contentions relate to the relative treatment of the protester and awardee in response to their low proposed prices. Under such circumstances, Eagle is an interested party. Cumberland Sound Pilots Ass'n, B-229642, Mar. 29, 1988, 88-1 CPD ¶ 316.

Eagle first contends that during discussions it was misled and coerced by the agency into increasing what otherwise would have been the winning price. While we would agree that an agency may not consciously mislead or coerce an

offeror into raising its price, see Johns Hopkins University, B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240, our review of the record discloses nothing to support Eagle's allegation. In evaluating Eagle's proposal, the contracting officer had access to Eagle's labor rates since Eagle was the incumbent contractor. Thus, he was aware that Eagle's low proposed rates, which included a competitive discount, would likely result in a loss of more than \$6 million over the potential 5 year contract term. Since Eagle's net worth appeared insufficient to absorb such a loss, this issue was discussed at length with Eagle. During written discussions with Eagle, the Navy advised Eagle that it appeared to present "an extremely high program risk." To resolve the issue of these low rates, the Navy requested Eagle either to "furnish a complete explanation of how your company can legitimately perform at this cost while remaining financially secure or revise your proposal to reflect a fair and reasonable price that will support a reasonable program risk." In response to these written comments and face to face discussions, Eagle advised that it would "offer rates which more realistically reflect the cost of doing business."

We find that the agency was reasonable in identifying its concerns over Eagle's low labor rates and in providing Eagle with alternative avenues of response. Eagle's decision to raise its rates to a "more realistic" level reflects its business judgment and, as such, we find that it was neither misled nor coerced into making that decision. The fact that unreasonably low rates were not a topic of discussion with the other offerors, whose prices were significantly higher, does not change our conclusion, since this was not an area of concern in those offerors' initial proposals.

Eagle next contends that the Navy misapplied the evaluation criteria contained in amendment 0004 in concluding that SSC was technically acceptable, notwithstanding the Navy's concern that SSC's rates were unreasonably low. Eagle contends that if the Navy had adhered to these evaluation criteria, SSC's proposal would have been determined unacceptable and the question of SSC's responsibility would not have been reached.

As indicated above, the Navy was concerned whether SSC had sufficient financial capability to perform the contract at its low proposed rates and amendment 0004 did identify as an evaluation factor an offeror's capability to absorb financial loss stemming from a difference between proposed rates and "probable real cost." However, recognizing that traditional responsibility factors may be used as technical

evaluation criteria only for purposes of comparative evaluation of proposals, but not for determining acceptability on a pass/fail basis,^{1/} see, e.g., Sanford and Sons Co., 67 Comp. Gen. 612 (1988), 88-2 CPD ¶ 266, the Navy did not utilize that financial capability factor for proposal evaluation; instead, it dealt with its concern through the responsibility determination and subsequent COC process. Since the Navy's action was consistent with the general rule concerning use of responsibility-type factors in evaluating proposals, we find nothing improper in what the Navy did here.

Eagle also contends that SSC was allowed to change its management structure after the submission of BAFOs. Since program management is one of the technical areas evaluated for award, Eagle alleges that this "restructuring" constituted improper post-BAFO discussions. We find nothing objectionable in relying upon SSC's revised management structure in determining its responsibility. First, SSC's actions were taken as part of the SBA's COC process, where firms are often allowed to furnish new evidence of responsibility after receipt of proposals and BAFOs. See Twin Tech Management, Inc., B-230862, July 22, 1988, 88-2 CPD ¶ 71. Second, obtaining information to ascertain a firm's responsibility does not constitute discussions so as to require that revised proposals be solicited from all offerors in the competitive range. A.B. Dick Co., B-233142, Jan. 31, 1989, 89-1 CPD ¶ 106. Here, SSC simply added new credit sources with significant working capital and assets to commit to the contract in order to demonstrate its financial responsibility. Since these new sources are not involved with SSC's management or the contract and SSC did not change its proposed subcontract technical team, there was no requirement that discussions be reopened.

Finally, Eagle argues that since it has formed a new relationship with another concern possessing greater financial resources, it too should have been given the opportunity to show that it could successfully perform at lower rates. Inasmuch as Eagle was given the choice when

^{1/} Since the amendment 0004 financial capability criterion was first added in the BAFO request and since award was to be made to the low acceptable offeror, the Navy could only make a pass/fail judgment on SSC's financial capability in evaluating its proposal.

BAFOs were requested to explain its ability to absorb loss or propose more realistic rates, and it chose to raise its rates, we do not believe it was prejudiced in not having a second chance to make a different business judgment.

Accordingly, the protest is denied.

for Raymond E. Hinchman
James F. Hinchman
General Counsel